KONG MING FINANCE CORP. BHD.

v.

TROPICAL HABITAT SDN. BHD.

HIGH COURT SABAH & SARAWAK, SIBU
CHONG SIEW FAI J
[ORIGINATING SUMMONS NO. 76 OF 1988]
6 NOVEMBER 1989

LAND LAW: *Caveats - Continuance - Onus on caveator - Rights based on deeds of assignment and sale and purchase agreements - Question of whether the sale and purchase agreements are capable of specific performance - Defence of termination and limitation - Consent from Director of Lands and Survey for dealings with land - Preservation of status quo.*

LAND LAW: *Land - Performance of sale and purchase agreement - Vendor of land not party to action - Principles.*

The vendor V had agreed to sell two lands ('the lands') to the borrower *via* 2 separate sale and purchase agreements ('the sale and purchase agreement'). The applicant had lent to the borrower some money secured by 2 loan agreements and 2 deeds assignments of each of the sale and purchase agreements. It was a term of the loan agreements that the borrower would cause the issue of the document of title to the lands and thereafter transfer the same to himself and then cause a charge in favour of the applicant to be created over the lands. The applicant lodged caveats over the lands ('the caveats') based on the sale and purchase agreements, the deeds of assignments and the loan agreements.

One year later, the documents of title to the lands were issued in the name of V. These titles contained a restriction to the effect that the consent of the Director of Lands and Surveys ('the Director') was necessary before any dealing affecting the land could be affected. B failed to make payment of the sums due to the applicant, failed to cause the lands to be transferred to himself and also failed to create the charge in favour of the applicant. In the meantime V through its attorney sold the lands to the respondent and the respondent had applied to have the instrument of transfer of the lands in their favour registered. The consent of the director was obtained for this transfer. Due to the presence of the caveats, the same could not be registered and the Assistant Registrar of Lands and Surveys, Sibu caused a notice under s. 178 of the Land Code ('the Code') to be issued to the applicant. The applicant then commenced 2 writ actions against the borrower claiming specific performance of B's covenant to transfer the lands to himself and charge the same to the applicant and for the whole loan sum with interest. The applicant commenced this action for the continuance in force of the caveats pending final disposal of the 2 writ actions.

Held:

[1] Taking into account s. 102 of the Evidence Act and s. 178 of the Code the onus is on the applicant to satisfy the Court that the circumstances of the case are such that the caveats ought to be allowed to continue.

[2] To decide whether the caveats ought to be allowed to remain in force, one important relevant factor to consider is whether the sale and purchase agreement is capable of being specifically performed.

[3] The applicant's claim for specific performance does not by itself entitle them to the extension of the caveats. Even if the applicant does succeed in the 2 actions for specific performance, V cannot be compelled to effect the transfer of the lands to B having regard to the manner, the relief claimed and the fact that V is not a party to the actions.

[4] It would appear that the applicant would be unlikely to succeed in obtaining the decrees of specific performance claimed. Even if they were successful, the decrees as framed would be unenforceable against the vendor who is not a party to the said actions. If such orders are enforceable, the same would result in a contravention of s. 33 of the Land Code.

[5] On the evidence presented, the applicant has failed to establish to the satisfaction of the Court that its interest in the said land raises any serious question to be tried. In addition the applicant had also failed to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the said 2 writ actions against B.

[Application dismissed with costs.]

Cases referred to:
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212
Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh [1970] 1 MLJ 145
R & I Securities Sdn. Bhd. v. Syarikat Tanaman dan Perusahaan Perak Sdn. Bhd. [1988] 2 CLJ (Rep) 378

Legislation referred to:
Evidence Act 1950, s. 102
Land Code (Cap 81) (Sarawak), ss. 33, (1)(a), 178

For the applicant - David Ting; M/s. Chan, Jugah, Hoo & Co.
For the respondent - Awang Bemee bin Awang Ali Basah appearing for J.C. Fong; M/s. Reddi & Co.

JUDGMENT

Chong Siew Fai J:

In this action the applicant applies for the continuation to remain in force of 2 caveats lodged by the applicant and registered at the Sibu Land Registry Office on 6 January 1984 and 10 February 1984 as Instruments No. L26/1984 and No. L479/1984 respectively affecting the parcel of land known as Lot 906 Block 4 Sibu Town District ('the said land').

Though in the summons the relief sought is for the 2 caveats to remain in force 'until further order of this Honourable Court', at the commencement of the hearing, Counsel for the applicant indicated that the applicant would seek the continuance in force of the 2 caveats until the disposal of the 2 actions (Civil Suit No. 50 of 1988 and Civil Suit No. 51 of 1988) brought by the applicant against one Haji Wan Hamid Edruce.

The facts as established by the evidence are, in the main, not disputed and may be stated as follows:

1. By a sale and purchase agreement dated 3 December 1983 (Exh. KHT3 annexed to Kiu Hieng Tiong's affidavit affirmed on 21 September 1988 - Kiu Hieng Tiong's 1st affidavit) Tun Datuk Petinggi Tuanku Hj. Bujang (the vendor) agreed to sell to Haji Wan Hamid Edruce the said land for RM650,000 of which a sum of RM500,000 was to be paid within 1 week from the date of the agreement and the balance, upon execution of a registrable memorandum of transfer by the vendor in favour of the purchaser, which was to take place within 1 month from the issue of the document of title relating to the said land.

2. By 2 loan agreements (Exhs. KHT1 and KHT7 annexed to Kiu Hieng Tiong's 1st affidavit) containing almost similar provisions and dated 5 December 1983 and 6 February 1984, the sums of RM500,000 and RM200,000 respectively (totalling RM700,000) were advanced by the applicant to the said Haji Wan Hamid Edruce (the borrower).

3. Under Clause (8) of the loan agreements the borrower was to secure, within one month from the date of the issue of the land title, the transfer of the said land to himself and the charge of the said land in favour of the applicant to secure repayment of the sums advanced and interest payable thereunder.

4. In consideration of the above loans advanced, 2 deeds of assignment were executed by the borrower assigning to the applicant absolutely all the borrower's rights and interests in the sale and purchase agreement relating to the said land. The 2 deeds are dated 5 December 1983 and 6 February 1984 (Exh. KHT2 and Exh. KHT8 annexed to Kiu Hieng Tiong's 1st affidavit) and contain, in substance, similar provisions. The vendor is not a party to the deeds of assignment. Nor is there evidence of his consent relating thereto being obtained.

5. Based on the sale and purchase agreement and the respective sets of the loan agreements and the deeds of assignment in point of time, the applicant lodged the 2 caveats in which the applicant claimed to be entitled to or to be beneficially interested in the said land and respecting which this action was brought seeking for their continuing to be in force. (Exhs. KHT4 and Exh. KHT9 annexed to Kiu Hieng Tiong's 1st affidavit).

6. The document of title to the said land was issued by the Land Registry Office, Sibu, on 24 July 1985 (Exh. B annexed to Wan Lili's affidavit made on 3 October 1988). The land title contains a restriction and special condition which reads:

> No dealing affecting this land may be effected without the consent in writing of the Director of Lands and Surveys.

7. In breach of the 2 loan agreements the borrower failed and still fails to cause the said land to be transferred to his own name and to charge the said land to the applicant as security for the repayment of the 2 loans of RM700,000 or balance thereof.

8. On 14 July 1988 the applicant received a notice dated 9 July 1988 issued under s. 178 of the Land Code by the Assistant Registrar of Lands & Surveys, Sibu, relating to the said 2 caveats. (Paragraph 22 of Kiu Hieng Tiong's 1st affidavit and Exh. KHT12 and para. 4 of Kiu Hieng Tiong's affidavit made on 7 October 1988). The notice was issued because of an application made on behalf of Tropical Habitat Sdn. Bhd., the respondent in this case, for registration of a memorandum of transfer of the said land by the vendor through his attorney in favour of the respondent, which registration could not be effected because of the 2 caveats lodged against the said land.

9. On 18 August 1988 the applicant commenced the 2 actions by way of writs of summons (Exhs. KHT6 and KHT11 annexed to Kiu Hieng Tiong's 1st affidavit) against the borrower claiming, *inter alia*, specific performance by the borrower to transfer the said land to the borrower himself and to charge the said land to the applicant pursuant to Clause (8) of the 2 loan agreements.

10. On 21 September 1988 the applicant commenced this action against the respondent for the continuance of the 2 caveats to remain in force.

Citing *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 PC, Counsel for the respondent submitted that it was for the applicant as caveator to satisfy the Court that the caveats should be allowed to remain to continue in force. In the case above cited, Lord Diplock said (pp. 214-215):

> As was pointed out by the Federal Court in *Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh* [1970] 1 MLJ 145, it is the caveator who is the applicant in proceedings brought under s. 326(2), and it is for him to begin and to satisfy the Court that there are sufficient grounds in fact and law for continuing the caveat in force after the month has elapsed. This in their Lordships' view is plainly right. ...
>
> Whereas the procedure under s. 326 for obtaining the removal of a caveat is available only to the caveatee, the procedure for applying directly to the Court for an order of removal is available not only to the caveatee but also to any other person aggrieved by the existence of the caveat - typically a purchaser to whom the registered proprietor has contracted to sell the land but the sale has not yet been completed by a proper instrument of transfer duly registered. In their Lordships' view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (that is the caveatee) and cases where the applicant is some other person who claims a right to an interest in it. In the former case the caveatee can rely upon his registered title as *prima facie* evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy the Court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so. So where, as in the instant case, the only parties to an application under s. 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under s. 326 and what he must establish to defeat the caveatee's application for removal of the caveat under s. 327.

It is significant to note that in the second paragraph of the passage above cited, reference was particularly made to applications where the parties are caveatee (registered proprietor of the land) and caveator. This was the situation in *Eng Mee Yong's* case and in the case of *Nanyang Development [1966] Sdn. Bhd. v. How Swee Poh* referred to above. In our present case, however, the respondent is not the caveatee nor registered proprietor of the said land. But, that, in my view, does not relieve the applicant of the onus in satisfying the Court of the existence of sufficient grounds to justify the continuance of the caveats to remain in force. The applicant applies for the relief. It is for the applicant to satisfy the Court that it is entitled to the relief sought. Section 102 of the Evidence Act 1950 provides that in a suit or proceeding the burden of proof lies on the person who would fail if no evidence at all were given on either side. Having regard to this and to s. 178 of the Land Code (Cap. 81), it is, in my view, clear that the onus is on the applicant to satisfy the Court that the circumstances of the case are such that the caveats ought to be allowed to continue remaining in force.

Since the 2 caveats were lodged by virtue of the sale and purchase agreement, the 2 respective sets of the loan agreements and the deeds of assignment and since the relief sought is for continuation in force of the 2 caveats till the disposal of the 2 civil suits, it is necessary to examine those documents and the 2 actions as well as all the other facts and circumstances in order to determine whether it is just and proper that they be allowed to remain in force till the disposal of the 2 actions.

The first thing to note about the sale and purchase agreement is that the parties thereto that is the vendor and the borrower as the purchaser are not parties in this action. The completion date of the agreement was within one month from the issue of the document of title to the said land (Clause 2(b) thereof). The document of title was registered and issued on 24 July 1985 (see para. 7 of Kiu Hieng Tiong's 1st affidavit; and Exh. B annexed to Wan Lili's affidavit).

On the evidence the completion date for the sale and purchase agreement, therefore, was 24 August 1985 that is one month from 24 July 1985. The title contains a 'no dealing without written consent' condition which has been set out above.

To decide whether the caveats ought to be allowed to remain in force, one important relevant factor to consider is whether the sale and purchase agreement is capable of being specifically performed. For the following reasons, specific performance of the said agreement appears to be out of the question:

(a) As noted earlier, the borrower (Haji Wan Hamid Edruce) is the purchaser under the sale and purchase agreement. In his affidavit made on 3 October 1988, he deposed that no consent had been given by the Director of Lands and Surveys for the transfer of the said land to him. Nor was such consent given for the creation by him of any charge affecting the said land in favour of the applicant. I am aware that the affidavit was filed on behalf of the respondent. But the evidence is not controverted.

For the applicant it was pointed out that no condition restricting dealings was imposed on the parent lot of the said land and that at the time of entering into the sale and purchase agreement and the 2 loan agreements the condition restricting dealings was not in existence. That the latter point must be so is obvious because in point of time the document of title relating to the said land was issued more than a year after the creation of those agreements. However, for the purpose of this case, I see no merit in the point raised. The applicant is a party to the loan agreements only and not to the sale and purchase agreement. Hence, its caveats were founded principally on the loan agreements which, in turn, relied on the sale and purchase agreement as the basis for the transfer of the land to the borrower, who is not a party to this action. There is no evidence of any step being taken by either the borrower or the applicant to improve or vindicate their position by reason of the subsequent imposition of the title condition that is applying for the requisite consent for the transfer of the land to the borrower and for the charge thereof in favour of the applicant.

On the evidence, the condition restricting dealing appears to have been imposed by the authorities issuing the land title (that is the Lands & Surveys) and, unless and until the condition is removed, the vendor and the borrower and, for that matter, anyone intending to deal with the land are bound to observe the restriction contained in the land title.

(b) The borrower further deposed in his affidavit that he was unable to and did not pay the full purchase price for the said land. His deposition and exhibit 'A' annexed to his affidavit shows that by reason of the non-payment, the sale and purchase agreement had either been terminated by the vendor through his attorney, Datuk Wan Yusof or mutually terminated. Whichever way one looks at the evidence, it indicates termination of the agreement.

For the applicant it was contended that the borrower's evidence in this respect was inconclusive and that there was no evidence of confirmation from the vendor's attorney Wan Yusof. The applicant did not, by affidavit evidence or otherwise, challenge the above assertions of the borrower. The Court acts on evidence. When the borrower's testimony in this respect is tested against the rest of the relevant evidence and materials available in this case, I am not persuaded that his evidence should be disbelieved. His evidence, in a way, is against his own interest being admission of breach and incapable to perform on his part. Moreover, I tend to agree with submission by Counsel for the respondent that the onus is on the applicant to show that the sale and purchase agreement is still subsisting and capable of being specifically enforced or performed.

(c) There is no evidence indicating any action having been instituted to enforce the sale and purchase agreement. Nor did Counsel for the applicant submit any such step having been taken. Generally speaking, the presence of a caveat on the land register is a blot on the land affected and tends to hamper the registered proprietor of the land in negotiations for the sale mortgage or lease thereof; therefore, unless a caveator proceeds with reasonable diligence and demonstrates some reasonable chance of being able to establish, in due course of law, a superior right, he ought not be allowed to continue to interfere with rights of the registered proprietor. In the instant case, the contractual date for the performance of the sale and purchase agreement was, as stated earlier, 24 August 1985. The period of limitation for specific performance of a contract is 3 years and, in this case, the 3 year period would run from 24 August 1985 (item 90 of the schedule to the Limitation Ordinance Cap. 49). Hence, by now or even by the date of the hearing of this application, limitation has or had set in so that any action instituted for specific performance of the sale and purchase agreement would have been barred by limitation. *R & I Securities Sdn. Bhd. v. Syarikat Tanaman dan Perusahaan Perak Sdn. Bhd.* [1988] 2 CLJ (Rep) 378.

The applicant has commenced 2 actions against the borrower claiming, *inter alia*, specific performance by the borrower of Clause (8) of the two loan agreements requiring the borrower to transfer the said land to himself and to charge it to the applicant to secure repayments of the loans advanced and interest thereunder.

Clause (8) of the 2 loan agreements are identical and read as follows:

> (8) Within one (1) month from date of issue of original title deed to Lot 906, the borrower shall unreservedly secure that the Lot 906 shall have been duly transferred in his name and at the same time shall be charged to the corporation free from encumbrances to secure the repayment of the loan or the balance thereof as shall then be outstanding plus interest as specified.

In the above clauses, "the corporation", of course, is the applicant.

The fact that there is a claim for specific performance in an action does not, by itself, necessarily entitle the extension of a caveat. See *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 @ 218 1st col. D-F. In the case before me, the registered owner of the said land that is the vendor, is not a party to the 2 loan agreements, nor is he or his estate a party to any of the said 2 actions - Civil Suit No. 50/1988 and Civil Suit No. 51/1988. Therefore, even if the applicant succeeded in obtaining a decree of specific performance in terms as couched in the 2 actions, which is unlikely, the vendor or his estate or his attorney could not be compelled or effectively ordered by such decree to effect the transfer of his said land to the borrower having regard to the manner, the relief is claimed and the fact that the vendor or his estate is not a party to the actions. I said 'unlikely' because of the uncontroverted evidence of admission of non-payment of the full purchase price on the part of the borrower. There is, of course, the further element of the claim of specific performance of transfer under the sale and purchase agreement being barred by limitation with which I have already dealt.

Moreover, the said land is, as stated earlier, subject to the restriction and special condition of no dealing respecting thereto without the consent in writing of the Director of Lands and Surveys. The applicant's interest in the said land is that of prospective chargee. On the evidence no consent of the director has been obtained for the transfer of the said land to the borrower, nor for the creation of a charge in favour of the applicant.

Section 33(1)(a) of the Land Code as amended by the Land Code (Amendment) Ordinance 1988 (No. 8 of 1988) makes it an offence and imposes fine on a registered proprietor of land in the event of a breach or default in the observance of any of the conditions of the document of title relating to the land, and subsection (b) thereof renders the land liable to forfeiture and re-entry. Hence, even if the vendor or his estate could be compelled to act so as to give effect to the relief as claimed, there would be contravention of s. 33 of the Land Code. In my opinion, the Court ought not lend its hand to grant the relief as sought in protection of an interest arising from a dealing the creation of which requires express consent which had not been obtained, and the performance of which relief, if granted and if capable of having it enforced upon the vendor as the registered landowner to perform, would contravene an express provision of the law and render the registered landowner liable to committing an offence and his land liable to forfeiture. In other words, there can, in my view, be no question of the alleged contractual right of the applicant being capable of specific performance since an order of specific performance as claimed would, in the circumstances, be tantamount to authorising the applicant to enforce or to compel the vendor or his estate (if compellable) or to compel the borrower to do something which is prohibited by the document of title relating to the said land thereby rendering the registered landowner liable to be guilty of an offence or the said land liable to forfeiture under s. 33 of the Land Code.

I am aware that the special condition requiring written consent for dealing with the said land was imposed subsequent to the conclusion of the sale and purchase agreement and the loan agreements. That, however, does not alter my view respecting the position of the Court having regard to the relief sought in this application, which is for the continuing in force of the 2 caveats. On the evidence, the caveats were lodged by the applicant against the said land belonging to the vendor in anticipation of the transfer of the said land to the borrower and of the execution of a memorandum or memoranda of charge by the borrower in favour of the applicant. By this action the applicant seeks to keep the 2 caveats continuing in force until the disposal of the 2 Suits Nos. 50/1988 and 51/1988 it has brought against the borrower. However, no action has been brought by the borrower against the vendor or the latter's estate for specific performance of the sale and purchase agreement and an action for such relief, if instituted now, would be statute-barred. Furthermore, the borrower on his own admission had failed to pay the full purchase price; there is evidence of repudiation of the sale and purchase agreement between the borrower and the vendor on account of the non-payment. Moreover, there is the special condition in the document of title to the said land requiring written consent of the Director of Lands and Surveys for dealings and no such consent has been obtained or suggested to be forthcoming for the sale of the said land to the borrower and for the creation of a charge or charges by the borrower in favour of the applicant.

For all the above reasons, it appears clear that, for the purpose of this application, the applicant is unlikely to succeed in obtaining the decrees of specific performance claimed in the said 2 suits. But even if the applicant succeeds in obtaining the specific reliefs as couched in the said 2 suits, the decrees as therein framed, would be unenforceable against the vendor or his estate who or which is not a party to the said 2 suits, and, if enforceable, there would, as stated earlier, be contravention of s. 33 of the Land Code.

Accordingly, on the evidence presented, the applicant has failed to establish to the satisfaction of the Court that its interest in the said land as advanced raises any serious question to be tried.

I would take the matter a step further. Assuming that I am wrong and that there exists a serious question to be tried respecting the applicant's claim to its interest in the said land, has the applicant shown that on balance of convenience it would be better to maintain the *status quo* until the trial of the 2 actions?

On the facts of the present case, the first thing to note as stated earlier is that the caveatee that is the vendor/registered owner of the said land or his estate is not a party to this action. As such he or his estate had not been heard. Next, the vendor/registered owner of the said land or his estate is also not a party to the 2 said actions Civil Suit Nos. 50 of 1988 and 51 of 1988. As such and having regard to the relevant relief claimed in each of the said 2 actions that is "specific performance of a covenant by the defendant (the borrower) to transfer the said land to himself" (brackets and the words within them added), it is clear that the relief even if granted (and I have already expressed the unlikelihood of the applicant succeeding for reasons, *inter alia*, of the borrower's own admission of non-payment of the full purchase price) would not be binding nor enforceable against the vendor or his estate. Furthermore, there is the title condition restricting dealings without the written consent of the Director of Lands & Surveys and on the evidence no consent for the transfer of the said land to the borrower and subsequent charge thereof to the applicant had been obtained or applied for.

There is also evidence that the sale and purchase agreement had been treated as having been repudiated by the default of the borrower. On the other hand, there is evidence that the requisite consent of the director for the sale of the said land by the vendor to the respondent in this action had been obtained, memorandum of transfer of the said land by the vendor to the respondent had been presented to the Lands and Surveys, Sibu, for registration and the stamp duty thereof had been paid. Another factor is that in each of the said 2 actions against the borrower, there is the alternative claim for judgment in the sums advanced to the borrower and interest accrued and due thereunder.

In all the circumstances particularly having regard to the unenforceability of the specific reliefs (assuming they are granted) in the said 2 actions against the vendor and the absence of consent for the transfer of the said land to the borrower and for the subsequent charge thereof in favour of the applicant on the one hand, and the sale to the respondent for which consent of the Director of Lands and Surveys having been obtained, transfer executed and presented for registration, and stamp duty paid on the other hand, the applicant had failed to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the said 2 actions.

The grounds as advanced by the applicant fall far short of justifying the continuing of the 2 caveats lodged.

For all the above reasons, the application is dismissed with costs to be paid by the applicant to the respondent. In the absence of an agreement, such costs are to be taxed.

Also found at [1990] 2 CLJ 242